Ellison Media Company *and* Mary E. Christie. Case 28–CA–19026

July 20, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 29, 2004, Administrative Law Judge Thomas M. Patton issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.[2]

The General Counsel excepts to the judge's dismissal of the allegations that the Respondent violated Section 8(a)(1) by promulgating an unlawfully broad no-communication rule and by threatening employees with discharge for violating that rule.[3] In late July 2003,[4] at the urging of employee Mary Christie, employee Daniel Miller confronted supervisor Joel Gable about a sexually suggestive comment that Miller thought Gable had made. Miller drafted an e-mail to Christie describing the confrontation, but he mistakenly sent the e-mail to Gable. Holding up a copy of the e-mail, Gable told Miller that "this needs to stop now" and that if he saw Miller and Christie gossiping anymore, Miller would lose his job. Subsequently, the same order was directed to Christie. The judge found that the order was a lawful prohibition of unprotected gossip, and therefore the threat of discharge for violation of the order was similarly lawful. For the reasons set forth below, we reverse and find that the Respondent violated Section 8(a)(1) as alleged.

A. Background

The Respondent purchases radio and television time for its clients, chiefly for infomercials and religious programming. In the media department work area on the morning of July 30, employee Miller thought he heard Supervisor Gable make a remark about Vice President Jay Griffin "running around Desert Ridge with his banana hanging out." Gable actually said "banana hammock," meaning a Speedo swimsuit. Miller told Gable that the remark offended him, but there was no further discussion at that time.

Later that same day, while getting coffee in the kitchen area on an upper floor, Miller told employee Christie his understanding of what Gable had said. Christie had previously complained to management on multiple occasions about statements Gable had made to her that she found objectionable, i.e., references to Griffin as Christie's "boyfriend" or "husband."

Christie urged Miller to report the remark to Griffin or to human resources. Looking out a window, Christie and Miller saw Griffin entering the building, and Christie told Miller that this was his opportunity. They rode the elevator down together to the lobby. When the elevator doors opened, Gable was standing there, and Miller testified that he then "exploded" at Gable about the remarks Miller understood Gable to have made about Griffin. Christie went back up the elevator.

After his confrontation with Gable, Miller drafted an e-mail to Christie describing how it ended:

> The elevator closed and Joel [Gable] was saying 'what you want to argue with me right here?' and I said sure, and Joel got pissed and I said 'if I heard incorrectly. . .

[1] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by maintaining a rule in its employee handbook that prohibits soliciting during working hours and/or in working areas.

[2] We shall modify the judge's recommended Order to conform to our findings herein, and we shall substitute a new notice in accordance with the Order as modified.

[3] The General Counsel also excepts to the judge's dismissal of the allegation that Charging Party Mary Christie's discharge violated Sec. 8(a)(1). The judge found that the General Counsel failed to establish that protected concerted activity was a motivating factor in Christie's discharge because he did not show that the Respondent had knowledge of that activity. For the reason stated by the judge, Chairman Battista and Member Schaumber affirm the dismissal of this allegation.

Member Liebman concurs in the result. She assumes arguendo that the General Counsel satisfied his initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of demonstrating that Christie's protected concerted activity was a motivating factor in the Respondent's decision to discharge her. Member Liebman concludes that the Respondent met its burden under *Wright Line* of establishing that it would have discharged Christie even absent her protected concerted activity. The evidence shows that the Respondent restructured its media department due to the loss of several major clients, which resulted in substantial lost revenue. The evidence also shows that Christie was selected for discharge in this restructuring because she limited herself to buying radio time only, while all other media buyers bought both radio and television time. On this basis, Member Liebman agrees with her colleagues that Christie's discharge did not violate Sec. 8(a)(1).

As noted above, Chairman Battista and Member Schaumber conclude that the General Counsel did not meet his *Wright Line* burden. Further, even if the General Counsel did so, Chairman Battista and Member Schaumber agree with Member Liebman that the Respondent satisfied its *Wright Line* rebuttal burden.

[4] All dates refer to 2003 unless otherwise indicated.

> then I said ok, I heard incorrectly but that's what I heard and we can ask Betty what you said' Joel stalked off and said 'Where is my CBS avails three days late I want those avails.' This all said while he was stalking toward the door to go back to his office.

Miller then mistakenly sent the e-mail to Gable rather than Christie. Gable responded to Miller's e-mail, requesting that Miller meet with him the next morning. Miller asked if he could have another manager present. Gable agreed, and Miller asked Human Resources Manager Rhonda Sports to attend.

On July 31, Gable, Miller, and Sports met in Gable's office. Gable held up a copy of Miller's e-mail and said, "This needs to stop now." Gable stated that he was tired of the gossiping, and that if he saw Miller and Christie gossiping anymore, Miller would be fired.

After Miller left the meeting with Gable, Christie asked Miller what happened. Miller told her that he could not speak to her because if they were seen gossiping together, they would be fired. Christie went to Sports' office where Sports told her that Gable said if he saw Miller and Christie talking about "this situation," Christie would be fired. Both Miller and Christie wrote memos to Sports regarding Gable's "banana hammock" comment. Gable received a written warning for violating the Respondent's sexual harassment policy, which prohibits inappropriate conduct or comments even if such comments or conduct might not be severe enough to constitute sexual harassment under the law.

B. The Judge's Decision

The judge concluded that the Respondent did not violate Section 8(a)(1) when Gable held up the e-mail and told Miller that "this needs to stop now," nor when he threatened to discharge Miller if he saw him gossiping with Christie. The judge found that the initial conversation between Christie and Miller in the kitchen was protected concerted activity, but that Miller's confrontation with Gable outside the elevator was not. The judge further found that Miller's subsequent e-mail was neither protected nor concerted. The judge reasoned that the e-mail did not address Miller's concern about the remark he thought Gable made and did not look toward group action, but was simply gossip about the unprotected elevator incident. The judge concluded that, under the circumstances, a reasonable employee in Miller's position would not have understood Gable's prohibition of further gossip to prohibit concerted activity related to terms and conditions of employment. Because the judge found Gable's order to be a lawful prohibition of malicious gossip, he also found lawful the threat of discharge for violating the order. Similarly, he found that Rhonda Sports did not violate Section 8(a)(1) by repeating to Christie the same prohibition against gossip.

C. Analysis

Under Section 8(a)(1), an employer may not "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co*., 124 NLRB 146, 147 (1959). "In determining whether an employer's statement violates Section 8(a)(1), the Board considers the totality of the relevant circumstances." *Saginaw Control & Engineering, Inc*., 339 NLRB 541 (2003). Here, under all of the circumstances and contrary to the judge's view, the statements at issue reasonably would have been interpreted either as an order not to engage in protected concerted activity or as a threat of discharge for engaging in such activity.

1. Gable's statement that "this needs to stop now," uttered while holding Miller's e-mail, was unlawful because it reasonably tended to interfere with Miller's free exercise of his Section 7 right to discuss sexual harassment complaints with other employees.

The judge erred in failing to consider Gable's statement in its full context, but instead viewing it as referring solely to what the judge found was the unprotected gossiping reflected in Miller's e-mail. We need not pass on the judge's finding with respect to whether the e-mail itself was protected, to which the General Counsel has excepted. The judge's mistake, rather, was in construing Gable's order too narrowly. In view of the circumstances in which the e-mail was sent, a reasonable employee would have interpreted the order as referring not only to the specific content of the e-mail (a discussion of the elevator confrontation between Miller and Gable), but also to what prompted that confrontation: the efforts of Miller and Christie to speak about Gable's allegedly sexually suggestive comments.[5]

No exceptions were filed to the judge's clearly correct finding that the conversation between Miller and Christie in the kitchen was protected concerted activity. In that conversation, Miller revealed to Christie his understanding of Gable's sexually suggestive comment. Christie, who had complained repeatedly in the past about comments by Gable that she found offensive, urged Miller to report Gable's comment to management. The conversation was concerted under the *Mushroom Transportation*

[5] See, e.g., *Armstrong Machine Co*., 343 NLRB No. 122, slip op. at 4 (2004) (employer's ambiguous statements violated Sec. 8(a)(1) where such statements would have the reasonable tendency to coerce employees in the exercise of their Sec. 7 rights).

line of cases.[6] And it was protected because it was engaged in for the purpose of "mutual aid or protection" within the meaning of Section 7 of the Act, i.e., the two employees' common interest in eliminating offensive remarks from their workplace.[7]

2. We further find that the Respondent violated Section 8(a)(1) when Gable threatened to discharge Miller for gossiping with Christie. Just as Gable's statement "this needs to stop now" would reasonably be interpreted to prohibit discussion of the suggestive comment, likewise Gable's threat would reasonably be interpreted to mean that Miller would be discharged if he continued to exercise his protected right to discuss the comment with Christie.

3. Last, the Respondent violated Section 8(a)(1) when Sports repeated Gable's order and threat to Christie. Sports told Christie that she would be fired if Gable saw them talking together about "this situation." In this context, an employee in Christie's situation would reasonably understand Sports' ambiguous statement to prohibit her from speaking to Miller about Gable's comment, which she had a protected right to do.

[6] *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) ("It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."). Accord: *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).

[7] See *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (Sec. 7 protects employees' right to discuss their sexual harassment complaints among themselves), enfd. mem. 63 Fed. Appx. 524 (D.C. Cir. 2003); *All American Gourmet*, 292 NLRB 1111, 1130 (1989) (same).

In *Holling Press, Inc.*, 343 NLRB No. 45 (2004), the Board recently stated that sexual harassment at work "can be, and often is, of concern to many persons in the workplace." Slip op. at 3. In *Holling Press*, the Board found employee Catherine Fabozzi's efforts to enlist the help of another employee in her individual sexual harassment claim, saying the employee could be "hit" with a subpoena, were not for "mutual aid or protection" because her efforts were made to benefit Fabozzi alone. Fabozzi's harassment claim had already been investigated by the employer and the union and found to be without merit. Fabozzi, however, filed a sexual harassment claim with a State agency. She then approached employee Susan Garcia and asked her to appear as a witness on Fabozzi's behalf. When Garcia hesitated, Fabozzi threatened to force Garcia to testify by "hitting" her with a subpoena. In finding that Fabozzi's actions were not for "mutual aid or protection," the Board emphasized that there was no evidence that any other employee had similar problems, and that the employee whose aid was sought was unconcerned with Fabozzi's complaint and uninterested in supporting it. Id., slip op. at 2. Here, by contrast, Christie herself had reported Gable's offensive remarks to management, and she supported Miller by encouraging him to report Gable's "banana" comment. Thus, *Holling Press* is clearly distinguishable. Member Liebman agrees that *Holling Press* is distinguishable, but she adheres to her dissent in that case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ellison Media Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(b) and (c) and reletter the subsequent paragraphs accordingly.

"(b) Promulgating an overly broad no-communication rule reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

"(c) Threatening employees with discharge for violating an overly broad no-communication rule."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 20, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the rule in our employee handbook that prohibits soliciting during working hours and/or in working areas.

WE WILL NOT promulgate an overly broad no-communication rule that reasonably tends to interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL NOT threaten you with discharge for violating an overly broad no-communication rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind the rule in our employee handbook that prohibits soliciting during working hours and/or in working areas.

ELLISON MEDIA COMPANY

William Mabry III, Esq., for the General Counsel.
Caroline A. Pilch, Esq.(Yen, Pilch & Komadina, PC), of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. This case was tried in Phoenix, Arizona. February 24–26, 2004.

The charge was filed by Mary E. Christie, an individual, on September 30, 2003.[1] The charge was amended on November 26. The complaint issued on November 28, and alleges violations of Section 8(a)(1) of the National Labor Relations Act (the Act) by Ellison Media Company (the Employer or Respondent). Respondent denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses and after considering the briefs filed by the General Counsel and Respondent I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Ellison Media Company is an Arizona corporation, with an office and place of business in Phoenix, Arizona, where the alleged unfair labor practices occurred. Respondent admits and I find that it meets the Board's standards for asserting jurisdiction based on its operations and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

The complaint alleges that in late April 2003, Mary E. Christie and other employees of the Respondent engaged in protected concerted activity by making concerted complaints to the Employer about working conditions. The original complaint alleges five violations of Section 8(a)(1) of the Act by threats made and rules promulgated in April and July and that the Employer discharged Christie in violation of Section 8(a)(1) of the Act on August 13. At the hearing the complaint was amended, over the objection of the Employer, to add an allegation that a no-solicitation rule contained in an employee manual violated Section 8(a)(1).[3]

The answer denies any violation of the Act and denies that Christie was discharged. The Employer contends that Christie was terminated as a part of a restructuring and a workforce reduction of the media department where Christie worked, in response to a loss of clients and a major decline in the work available in her department. The Employer does not contend that Christie was selected for layoff because of deficiencies in her job performance.

B. Facts and Preliminary Conclusions

The Employer is engaged in providing media related activities, including the purchase of radio and television time for its clients. A major amount of the radio and television time is purchased for infomercials and religious theme programming. A subsidiary, Global Fulfillment & Duplication, handles fulfillment of orders for goods offered in broadcasts and makes duplicates of recordings that are offered by R's clients in their broadcasts. There are about 115 employees, a figure that varies depending on the number of employees needed in the fulfillment and duplication operation.

Michael Ellison is the founder and president of the Employer.[4] Four persons employed by the Respondent are alleged to have been supervisors within the meaning of Section 2(11) of the Act, and agents within the meaning of Section 2(13) of the Act. The supervisor and agent allegations regarding Media Vice President Barbara Griesman and Media Manager Joel Gable are admitted. The allegations regarding Human Resources Manager Rhonda Sports and Marketing Vice President Jay Griffin are admitted as to their 2(13) status and denied as to their 2(11) status. During the course of the hearing it was stipulated that Media Supervisor Marilee Gibson was a 2(11) supervisor.

Sports testified that she evaluated the employees in the human resources department. Thus, the evidence is that there were employees in Sports' department and she was the manager of that department. I accordingly conclude that Sports was a supervisor as defined in Sec. 2(11) of the Act.

There was testimony that at the time of the hearing there were employees in the media department who reported to Griffin, but not at the times relevant to the alleged unfair labor practices. The record shows, and the Employer does not dispute,

[1] All dates are 2003 unless otherwise indicated.

[2] In assessing credibility, testimony contrary to my findings has not been credited, based upon a review of the entire record and consideration of the probabilities and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

[3] The record does not show that Christie was unaware of the provision during the investigation of the charge, but General Counsel represented that the manual provision was not known to the government prior to the Employer furnishing the manual to the General Counsel on February 23, in response to a subpoena duces tecum.

[4] Corporate Vice President Barbara Griesman testified that the Employer did not have a board of directors "per se," suggesting that the Employer is a closely held corporation. No details were provided.

that Griffin was a corporate officer and a member of management. Corporate officers are not presumptively 2(11) supervisors. See *Upholsterers Local 61 (Minneapolis)*, 132 NLRB 40 (1961). It seems improbable that Griffin did not possess supervisory authority over any employee at the time of the alleged violations, however, the record evidence does not establish that he had such authority. A different conclusion would not affect my decision, since Griffin was a corporate officer and an admitted agent at all relevant times.

Mary Christie worked in the Employer's media department, under the supervision of Media Manager Joel Gable. Christie worked as a media buyer. Her job was to purchase radio time for clients. The Employer hired her in February 2000, and terminated her on August 13, 2003. Before going to work for the Employer Christie had about 9 years of work experience in marketing and media, including media buying. Christie received uniformly favorable appraisals and regular wage increases, including a merit raise.

1. No-solicitation rule

An "Employee Handbook," dated January 1, 2001, was in effect during the Section 10(b) limitations period and at the time of the hearing. In the absence of contrary evidence, I infer that it issued on January 1, 2001. Paragraph 2.7.1 is a list of "Unacceptable Activities" that includes a prohibition on soliciting during working hours and/or in working areas. Paragraph 2.7.1 is followed by provisions describing discipline that can be imposed on employees who engage in unacceptable behavior. Thus, the handbook subjects employees who engage in any soliciting during working hours and/or in working areas to discipline. There is no evidence that the rule was enforced against any employee and soliciting is not involved in the other alleged unfair labor practices.

The maintenance of the rule is facially unlawful because a rule that restricts solicitation protected by Section 7 of the Act during "working hours" connotes a prohibition from the beginning of a shift to the end, and is presumptively invalid. See *Our Way, Inc.*, 268 NLRB 394 (1983). There is no evidence that the Respondent communicated or applied the rule in such a way as to convey an intent to clearly permit solicitation protected by Section 7 during break times or other nonwork periods. See *Ichikoh Mfg.*, 312 NLRB 1022 (1993).

The Employer points to language in *Hughes Properties, Inc. v. NLRB*, 758 F.2d 1320 (9th Cir. 1985), where the court states, in a general discussion of the law, "A ban on all solicitation during working hours is presumptively valid, but a ban on all solicitation during non-working hours is presumptively invalid." The court did not conclude that a rule like the one in the present case was privileged and I do not read the decision in *Hughes Properties, Inc.* as inconsistent with *Our Way, Inc.*, supra. Assuming, without finding, that there is a current conflict between the Board and the Ninth Circuit regarding this question, I am required to follow the Board's precedent until overruled by the Board or the Supreme Court. *Insurance Agents' International Union, AFL–CIO*, 119 NLRB 768, 773 (1957).

The maintenance of the rule is also facially unlawful because it prohibits solicitation protected by Section 7 of the Act in working areas. In the absence of special circumstances not shown in this case, Respondent may not prohibit employees from engaging in protected soliciting in working areas or elsewhere on company property during nonworking time, whether before or after work, or during lunch or rest periods. It makes no difference that the employer may be paying the employees for nonworking time. *McBride's of Naylor Road*, 229 NLRB 795 (1977); *Kern's Bakery, Inc.*, 154 NLRB 1582 (1965).

The rule was promulgated outside the limitations period in Section 10(b) of the Act, but the rule was maintained within the 6-month limitations period from the filing of the original charge. The Respondent's maintenance of the unlawfull restrictions on solicitation within the 10(b) period violated Section 8(a)(1), even without any enforcement of the rule. *Varo Inc*., 172 NLRB 2062 fn.1 (1968).

2. April 25 rule and threat

The complaint alleges that on or about April 25 Griesman "promulgated an overly-broad and discriminatory rule prohibiting its employees from communicating conversations relating to terms and conditions of employment between employees in the Respondent's Media Department and the Respondent to other employees of the Respondent." The complaint further alleges that on the same date Griesman threatened employees with discharge if they violated that prohibition.

Information regarding media buys by the Employer's clients is considered confidential by both the clients and the Employer. It is a policy of the Employer to withhold this information from personnel outside the media department. The record shows that supervisors and managers outside the media department have acquired confidential information they have not been authorized to receive from media department employees.

On April 25, in the course of a weekly media department meeting attended by all department employees, Griesman made the statement, "What goes on in media stays in media." The General Counsel contends that Griesman's statement, by its terms, prohibited media department employees from reporting workplace violations to government agencies, such as the Board and the EEOC and prohibited employees from discussing their own terms and conditions of employment outside the department. The Employer contends that the statement must be read in the context of Griesman stressing the Employer's confidentiality policy.

Former employee Barbara Washington worked in the media department and was at the meeting.[5] Washington and Christie shared an office. Washington assisted buyers, principally Christie. Washington testified as follows regarding the April 25 meeting:

> I remember [Griesman] being very upset about—whatever was going on at the time, it got out of the media department and other people in the office building, different departments, heard what was going on, and she expressed that she did not like that at all and that, quote, "what goes on in media stays in media," unquote. And she also was saying to us that if she

[5] Washington was terminated on August 6. She testified, in substance, that she should have been kept on in preference to two part-time employees.

> ever got word back that any one of us was saying whatever was going on in media, good or bad, whatever, mainly bad, I guess, any complaints, that if it got back to her from somebody else in the building, that we would be fired.

Washington did not describe specifically what it was that "got out of the media department."

Christie testified as follows regarding the April 25 meeting:

> [Griesman] had indicated that it had come to her attention that some of the media department personnel was conversing and talking with other departments in the company and that she did not like that, she would not tolerate it, and what happened in media stayed in media and if we did not like it, that there was the door and it would not hurt her feelings if we looked for employment elsewhere.

On cross-examination Christie was asked if Griesman did not also say that "her directive meant: when other individuals came and asked for media department information, including client information, statistics, income, to please direct them to Joel and herself so that not everyone in the department was scattering information about and there was some control over who was giving information?" Christie acknowledged that Griesman had said that, but that she could not say whether it was in the same meeting or not.

Daniel Miller was a media buyer who was present at the meeting. According to Miller Griesman's statement that what goes on in media stays in was made in reference to client information that should not be revealed to persons outside the department or to other clients. Miller testified that Griesman said that employees should not give information to marketing vice president Jay Griffin. Miller described how Griffin came to the media department and asked Christie about information kept in the department and Christie would provide him with documents and explain them to Griffin. Miller specifically recalled Griesman referring to the Employer's nondisclosure policy. The Employee Handbook list of unacceptable activities includes the following:

> Giving confidential or proprietary Ellison Media company information to . . . unauthorized Ellison Media company employees; . . .

Griesman testified that she told employees, in substance, that "what goes on in media stays in media" in the context of her expressing her concern that confidential business information not be shared with employees outside the department.

Griesman had sent an e-mail to all media department employees on April 1. The General Counsel contends that this e-mail supports the position of the General Counsel regarding the message Griesman delivered at the April 25 meeting. At the hearing the General Counsel stated that the April 1 memorandum was also violative, however, the complaint was not so amended. The e-mail states, in relevant part:

> If you receive directives from anyone outside of this department please do yourself and your fellow co-workers a favor by asking that person to see either Joel or me, as is appropriate. You will save yourself a lot of unnecessary trouble, not to mention time, if you simply say "you will need to speak to Barbara or Joel about that." End of discussion.

The General Counsel cites *Double Eagle Hotel & Casino*, 341 NLRB No. 17 (2004), and argues that the e-mail shows that the purpose of Griesman's remark on April 25, was to prohibit employees from discussing their own terms and conditions of employment, including their own experiences of sexual harassment in the workplace. This argument is unconvincing. A fair reading of the e-mail is that it is consistent with Griesman's testimony that in the April 25 meeting she was addressing the disclosure of confidential business information to persons outside the media department. The rule in the Employee manual regarding confidential or proprietary information is analogous to a rule found privileged by the Board in *Lafayette Park Hotel*, 326 NLRB 824 (1998). That rule read, "Divulging Hotel-private information to employees . . . not authorized to receive that information."

I credit the testimony of Griesman and Miller regarding the April 25 meeting because it was more credibly offered and more probable than the testimony of Washington and Christie. The evidence does not show that Christie's statement that "what goes on in media stays in media," when considered in the context of Griesman's remarks, prohibited employee speech protected by Section 8(a)(1). Accordingly, I shall recommend dismissal of the allegation that an unlawful rule was promulgated on April 25.

The issue of unauthorized release of confidential information was of major concern to Griesman and she does not deny telling employees that "there was the door" if they did not want to comply with the policy. Because the threat was not directed toward protected concerted activity, it was not violative. Accordingly I shall recommend that the allegation regarding an unlawful threat on April 25, be dismissed. Assuming, without deciding, that the legality of the April 1 memorandum is before me for decision, I conclude that it did not violate the Act.

3. July 31 rule and threat

The complaint alleges that on July 31, Gable "promulgated an overly-broad and discriminatory rule prohibiting [Respondent's] employees from communicating conversations relating to terms and conditions of employment between employees in the Respondent's Media Department and the Respondent to other employees of the Respondent" and threatened its employees with discharge if they violated the rule. This assertedly occurred in a meeting of Gable, Miller, and Sports.

The complaint further alleges that on July 31, Sports "promulgated an overly-broad and discriminatory rule prohibiting [Respondent's] employees from discussing with other employees wages, hours, and other terms and conditions of employment." This assertedly occurred in a meeting of Christie and Sports where Sports described the earlier meeting between Gable, Miller, and Sports.

These alleged violations are related to a confrontation between Miller and Gable on July 30, and an e-mail Miller sent to Gable on July 30.

On the morning of July 30, Media Buyer Daniel Miller, Media Manager Joel Gable and several other employees were in

the media department work area. Miller heard Gable make a remark about vice president of marketing Jay Griffin. Miller understood Gabel to have referred to "Jay running around Desert Ridge with his banana hanging out." Gable had actually referred to Griffin running around in a Speedo or a banana hammock. Miller told Gable that his remark about Griffin offended him, but there was no extended discussion at that time. Gable was unaware that Miller had misunderstood what he had said. Miller and Gable were the only persons present who testified about the remark.

Later that day Miller and Christie went to a kitchen area for a cup of coffee. Both Miller and Christie testified regarding what happened thereafter. I found Miller's testimony to have been more credibly offered and more probable. Miller shared with Christie his understanding of what Gable had said. Christie was a workplace friend of Griffin. Christie urged Miller to report the remark to Griffin because he would not appreciate the way he was being talked about. Christie opined that Griffin would tell Ellison and ask him to fire Gable. Christie suggested that if Miller did not feel comfortable talking to Griffin, he could speak to Human Resources Manager Rhonda Sports. Miller testified that Christie despised Gable and that on several prior occasions she had told Miller that she would like to see Gable fired.

The area where Miller and Christie went for their coffee break was on an upper floor of the building. They looked out a window and saw Griffin walking in from a parking lot. Christie told Miller that this was his opportunity to report to Griffin what Gable had said about him. Miller and Christie got on the elevator and went down. When the elevator doors opened, both Gable and Griffin were near the elevator. At that point Gable remarked to Griffin that Miller had stood up for him that morning. Miller testified that he then "exploded." Miller exited the elevator and spoke to Gable loudly in an angry tone about the remarks he understood Gable to have made about Griffin and "his banana hanging out." Gable explained to Miller that he had said "banana hammock." After some discussion Gable and Miller then went on to discuss business issues.

Christie stayed on the elevator. Griffin did not join the discussion, but joined Christie on the elevator and they went up without Miller and Gable. Griffin asked what was going on and Christie related what Miller had told her about what Gable had purportedly said about Griffin. Griffin said that the remark Christie had described was sexually explicit and should be brought to the attention of human resources. They were standing outside of Sports' office. Christie testified that she then told Sports that she might want to talk to Miller. The record does not show that Sports knew what Christie was referring to or that she did anything as a consequence of Christie's remark. Thus, at this point the Employer had no knowledge that the confrontation between Miller and Gable (herein the elevator incident) was the product of the discussion between Miller and Christie that preceded it.

Following his conversation with Gable, Miller drafted an e-mail to Christie describing the final part of the encounter with Gable. Miller then mistakenly sent the e-mail to Gable. The e-mail stated:

> The elevator closed and Joel was saying 'what you want to argue with me right here?' and I said sure, and Joel got pissed and I said "if I heard incorrectly... then I said ok, I heard incorrectly but that's what I heard and we can ask Betty what you said" Joel stalked off and said 'Where is my CBS avails three days late I want those avails.' This all said while he was stalking toward the door to go back to his office.

Gable responded to Miller's e-mail the same day and asked if Miller would meet with him the following morning. Miller answered by e-mail and said he would feel more comfortable if Griesman or Sports was present. Gable responded "that's fine" and Miller arranged for Sports to be present. They met the following morning in Gable's office.

Gable, Sports, and Miller were at the meeting in Gable's office the following day, July 31. Gable voiced his displeasure with Miller regarding the elevator incident and what Gable said he felt was insubordination and stating that Miller should have come his office, rather than discussing the issue where he did. Gable also raised work performance issues that have not been shown to be unwarranted. During the conversation Gable held up a copy of the e-mail Miller had mistakenly sent to him the day before and said, "This needs to stop now." Gable stated that he was tired of the gossiping and that if he saw Miller and Christie gossiping anymore Miller would be fired. Gable gave Miller a "Disciplinary Warning Notice." There is no contention that the warning violated the Act. The warning stated:

> Daniels' overall performance as a media buyer is lagging behind the average monthly results for July. Also, Daniel's disrespectful and argumentative behavior yesterday borders on employee insubordination. Daniel has been spoken to several times in the past about proper communication channels with his direct supervisor. Continuing, the manner in which he communicates with his fellow employees must change to reflect a more positive approach rather than one of gossip. Dan has also made it clear that he does not particularly care for some of his duties including Tri Vita radio and Visual Bible.
>
> This disciplinary warning will serve as notice of a thirty-day (30) probationary period. Daniel must prove his value to the team within the time frame, improve is buying performance, and significantly work on office demeanor and communication through proper channels
>
> Next step if Infraction is repeated: Termination
>
> Supervisor Comments:
> As we continue to grow as a department, I am looking for team members to rally around each other and further the message of our clients. Unfortunately, I do not feel that Daniel has attempted to improve his communication with his supervisor.

Miller left this meeting with Gable and he walked past a copy machine where Christie was working. She asked him what happened and Miller told her "I can't talk to you right now," and he told Christie that if they were seen gossiping together they would be fired. Christie then went to Griffin and spoke with him. The record does not disclose the content of their conversation. Griffin then accompanied Christie to Sports office and said that Christie had some things to talk to her about and

left. Christie described the conversation that she then had with Sports:

> Q. What was this meeting about?
> A. I—I went up to Rhonda's office and told her that -- what Daniel had told me, that if he—that Joel said that if he saw him and I talking or going up for coffee or seeing us together, that I would be fired, and I asked her if it was true, and she said, "Well, that's what he said but not what he meant, what he meant was that if he saw you two together, then he would assume that you were talking about the Speedo incident" and that I would be fired.
> Q. Did you have a response to this?
> A. Yes. I told her it was wrong and -- that it was wrong and they can't do that, we work together, we work on the same account, we buy radio together, we have to -- we have to talk, and I said, "So even if we're working and talking about business, if Joel sees us, then he could just assume we're talking about the Speedo incident and I could be fired?" and she said, "Yes."
> Q. What happened next?
> A. She asked me to write a letter relaying all of the incidences that I have with Joel, she said that she had a meeting scheduled with Michael Ellison and that she was going to instruct Daniel to do the same thing.

In her testimony Christie left out her visit with Griffin and his taking her to Sport's office. Sports testified prior to Christie as an adverse witness in only general terms about her meeting with Christie on July 31. Sports was not recalled to deny Christie's version of what Sports had told her Gable had said to Miller. The General Counsel urges that an adverse inference is warranted from the failure of the Employer to call Sports to testify further regarding this conversation. See Advanced Installations, 257 NLRB 845 (1981). This contention might be more persuasive had Christie not memorialized the conversation in a memorandum to Sports.

Christie submitted a memorandum to Sports on August 1. The memorandum indicates a copy to Ellison, who was then on vacation. The heading of the memorandum identifies its subject as "harassment." Regarding her meeting with Sports on that day, Christie wrote:

> Your did clarify that Joel said that if he sees Daniel and I talking about this situation then that is when I would be terminated. Well, with all do respect, if Joel only assumed that the e-mail was meant for me then what guarantees do I have about him not assuming that Daniel and I are talking about this situation and fires me when in fact Daniel and I could have been talking about work issues.

Thus, the memorandum describes a significantly different version of Sports' description of what Gable had said. Christie did not explain the two materially different versions of what Sports had said. Of the two versions, the confirming memorandum is the more reliable and probable. I was not favorably impressed with Christie's testimony regarding the events that day. My impression of her testimony generally was that her accounts were selective and embellished. Thus, I do not believe that she simply overlooked describing in her testimony the fact that she talked with Griffin and he took her to report her concerns to human resources. While Gable did not actually tell Miller that Christie would also be fired, it was not unreasonable for Miller to have understood that the threat would also apply to Christie.

Christie's memorandum to Sports also addressed several other issues involving Gable. It describes multiple occasions when Gable asked Christie where her "husband" or her "boyfriend" was. The person Gable was referring to was Griffin. Christie and Griffin did not have a relationship outside the office. In the past Christie had reported these remarks to both Griffin and Griesman and objected to them. Griesman spoke to Gable about his making these remarks to Christie and he discontinued the practice. The memorandum next addresses a meeting of media department employees on February 12, when Gable said someone had complained about his language. Prior to this meeting Miller had complained to Griesman about offensive language by Gable. Griesman had spoken to Gable about not using offensive language, apparently in response to Miller's complaint. Christie went on to describe a discussion with Gable on April 25, when he told her "that he was tired of me strutting around the office like a cocky rooster, that I did not own the radio department, nor was I queen of the universe, and that I needed to change how people perceived me or the next time I was called into his office HR would be there and I would be terminated." Christie also described her version of her conversations with Miller preceding the confrontation between Miller and Gable at the elevator on July 30.

The discussion by Christie and Miller in the kitchen area that preceded the elevator incident was protected concerted activity. The General Counsel argues that the e-mail Miller mistakenly sent to Gable was itself also protected concerted activity. I do not agree. The General Counsel does not contend, and the evidence does not show, that Miller's outburst at Gable in the lobby was protected. In this regard, the General Counsel does not claim that the written warning Gable gave to Miller for his conduct after he got off the elevator and which addressed Miller's gossip was violative. The e-mail obviously provoked Gable to issue the warning at that time. The e-mail was no more than gossip about the unprotected elevator incident. The e-mail did not address Miller's concern about the remark he thought Gable had made about Griffin nor did it look to any concerted activity by employees. For communications between employees to be found to be protected concerted activity, they must look toward group action. The e-mail does not meet that standard. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964); *Alex R. Thomas & Co.*, 333 NLRB 153 (2001). The e-mail also had a malicious aspect. Despite Gable having told Miller that he had misunderstood what Gable had said, Miller did not mention Gable's explanation in the e-mail or inquire of other employees what they had heard Gable say. Instead, Miller recounted the incident in a manner that would feed the enmity Miller knew Christie had for Gable.

The General Counsel contends that the term "gossiping" is ambiguous and might reasonably be understood by an employee to be a reference to an effort to initiate group action about terms and conditions of employment. The General Counsel argues that Gable's statement that Miller would be fired if he saw Miller and Christie gossiping amounted to a prohibi-

tion on Miller and Christie talking to one another at work at all, including protected discussions relating to wages, hours and other terms and conditions of employment. The General Counsel asserts that a generalized prohibition on "gossiping and complaining" violates the Act, citing *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).

The Respondent's Employee Manual includes in a list of unacceptable activities the "Spreading of malicious gossip . . . " The legality of that prohibition is not challenged. Gable did not promulgate a new employee rule of general application. Rather, Gable addressed Miller's gossip with Christie and not protected speech. In *Aroostook* and other decisions that address limits on employee gossip the Board has considered the lawfulness of restrictions on gossip in the context when the restrictions are imposed. In *Aroostook* the restriction on gossip clearly referred to employees' protected concerted activity. The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made or the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995).

Gable was addressing unprotected malicious gossip like that in Miller's e-mail and not protected concerted activity. The written warning issued to Miller, the legality of which is not challenged, states "the manner in which he communicates with his fellow employees must change to reflect a more positive approach rather than one of gossip." An employer is privileged to prohibit and to threaten employees with discipline for malicious gossip. *Sams Club*, 342 NLRB No. 57 (2004); *Southern Maryland Hospital*, 293 NLRB 1209 (1989). Gable's statement that he would fire Miller if he was seen gossiping with Christie, considered in context, would not be reasonably understood by an employee in Miller's position to be a prohibition of discussions related to concerted activity about terms and conditions of employment.[6] I shall accordingly recommend the dismissal of the allegation that Gable promulgated a rule and threatened employees with discharge for violating the rule in violation of Section 8(a)(1).

Gable's motive for the action he took against Miller is not relevant to the issue of whether he promulgated an unlawful rule or made an unlawful threat. It has potential relevance, however, to the allegation that Christie was discharged in retaliation for her protected concerted activity with Miller immediately before the elevator incident. Gable did not know, at the time he threatened to fire Miller, that Miller and Christie had conferred and agreed just prior to the elevator incident to report Gable to Griffin. Based on a conversation immediately after the incident, Griffin knew that Miller had told Christie about Gable's asserted remark, but Griffin was not told that Miller and Christie had concertedly agreed to complain that Gable had made an offensive sexual remark. Moreover, the fact that Gable had his discussion immediately after the confrontation is objective proof that he had no knowledge of what Christie told Griffin as they rode up on the elevator or of what Christie testified she told Sports after getting off the elevator. In addition, the conclusory testimony by Christie that she told Sports on July 30 that she might want to talk to Miller did not put Sports on notice of Christie's protected concerted activity on July 30. I conclude that the evidence does not show that Gable's motive for the action he took against Miller on July 31 was the protected concerted activity by Christie and Miller that preceded the confrontation on July 30.

Sports did not promulgate a new rule on July 31. She repeated to Christie the substance of her understanding of Gable's warning to Miller about gossip. On July 30, Miller had told Christie about the misdirected e-mail and had talked with her again on July 31, after Christie's conversation with Sports. I infer that Miller related to Christie the details of his meeting with Gable on July 31, and shared with her the written warning he had received. Based upon the rationale for my conclusions regarding Gable's meeting with Miller on July 31, I shall recommend the dismissal of the allegation that Sports promulgated a rule in violation of Section 8(a)(1). There is no allegation that Sports unlawfully threatened Christie on July 31, and the evidence does not establish such a threat.

4. August 13 termination of Christie

On August 13, Christie was summoned to Sports' office. Sports, Griesman, and Gable were present. Sports told Christie that she was being let go due to a restructuring of the Media Department. Griesman stated that the decision was not related to Christie's performance and explained that a buyer for both radio and television was needed. Christie said that she could buy both radio and television time. Griesman observed that she had asked Christie to buy television time in the past and Christie had declined, saying that she preferred buying radio time. Christie asserted that that happened 2 years earlier.[7] Gable said that the decision would not be changed and he and Griesman left the office. Christie was given severance pay.

After Gable and Griesman left the office, Christie asked Sports if her termination was in retaliation for the August 1 letter she had given to Sports. Sports replied that she did not know, that she was just informed, about 30 minutes before she called Christie to her office. Sports said she is usually the one that goes to payroll and creates all the documents for letting personnel go. This testimony is not controverted. Sports statement is not inconsistent with her testimony, discussed later, that she did not share the August 1 memorandum with anyone prior to Christie's termination. The memorandum shows a copy to Michael Ellison and Sports had no reason at that time to assume that Ellison was not aware of the content of the memo.

Supervisor Marilee Gibson, who had worked for the Employer for 25 years, assumed Christie's accounts. Washington had provided support services for buyers, such as determining what media time was available and the costs. Griesman credibly described how buyers were able to do the tasks formerly

[6] Miller's individual understanding that he expressed to Christie is irrelevant. Electrical Workers Local 6, 318 NLRB 109 (1995). Moreover, it is probable that the written warning by Gable that Miller would be terminated if his work performance did not improve significantly influenced his interpretation of the gossiping restriction when he spoke with Christie following his meeting with Gable.

[7] The date when Christie was offered television work was not established.

performed by Washington by using new software that had been acquired and made available on each buyer's desk and that Washington was displaced by the new technology.

At the time of Christie's termination there were five buyers. They were Christie, Miller, Aubrey Winfrey, Shannon Witte, and Kristy Vavak. Following Christie's termination no additional buyers were hired until Andrea Eiler began work on February 2, 2004, as an entry-level junior media buyer, at a substantially lower salary than Christie had been paid and with less responsibility.

Vavak was hired on July 17, and began work on August 4. Asked to explain why Vavak was hired and retained in preference to Christie, Griesman testified that she had been hired to handle buying for a specific account, Visual Bible, which included radio, television, and print. Griesman testified that Christie had done only radio. The same reason was offered to explain why Christie was laid off, rather than one of the other buyers.

Griesman testified that when she evaluated who to lay off she concluded that Christie was objectively was no better than the other buyers, but the other buyers were more versatile because they bought both radio and television time. Griesman credibly described how she had twice asked Christie if she would like to buy television, but that Christie had declined. Griesman testified that on one occasion when she asked Christie about buying television Christie had said that she did not want to buy television and that "radio is my baby." Washington confirmed that Christie used that expression. Marilee Gibson credibly testified that on numerous occasions she had heard Christie call herself the "queen of radio," state that she never wanted to do TV and that she just wanted to do radio. Christie acknowledged that Gable told her that he would like to see her buy a market for television, but she made no effort in that regard.

Washington and Christie testified about Christie being very upset when a new employee, Jen Bradley, had been assigned to buy television.[8] This asserted event occurred before Christie and Washington began sharing an office, about 8 months before Washington was laid off. Christie and Washington's hearsay accounts were not credibly offered and are improbable. Christie acknowledged on cross examination that Griesman had called her into her office before Bradley was hired and asked Christie if she wanted to buy television and that she answered that she would rather buy radio. Moreover, Marilee Gibson credibly testified that Christie had told her that she never wanted to do television. There were meetings to address conflicts between Christie and Bradley where they were present, as were Gibson, Sports, and Griesman, but Christie's claim at the hearing that she was denied a television assignment that was given to Bradley was not mentioned by Christie at those meetings. Even if Christie and Washington's accounts of Christie's complaint about Bradley were credited, they would have little probative value. The Employer had no knowledge of the complaint. For the reasons discussed in detail infra, the Employer is not presumed to be aware of the claimed conversation between Christie and Washington based on a "small plant" theory. Accordingly, the claimed conversation between Christie and Washington is not inconsistent with the Employer's evidence that Christie had demonstrated no interest in television work.

The evidence shows that Christie's job performance was good and that the Employer had recognized the quality of her work. There is evidence that in the area of bonuses (negotiating free media time) Christie had higher figures than other buyers, although it is not entirely clear how comparable her bonuses were to those of other employees, since she did only radio work. In any case, a preponderance of the evidence does not show that her job performance was superior to that of other buyers.

The uncontroverted testimony of Griesman and Ellison was that the Employer was notified during the first and second quarters of 2003 that several clients gave notice that they would cease using the Employer to buy broadcast time. The clients were identified by Griesman as Life Changers International, Jerald Mann Ministries, Trinity Church of Amarillo, Texas, and Casey Treat (apparently religious broadcasters). There were existing contracts for time that had already been purchased 4 these clients, which could be cancelled, typically with four weeks notice. The contracts were for television time and possibly radio time. Some of the lost clients sought cancellation of their existing contracts. Griesman and Ellison testified that Christie was terminated in response to a loss of revenue of approximately $50,000 per month because of the loss of clients.[9]

Evidence in the form of business records was not offered to corroborate the testimony of Griesman and Ellison regarding the lost business and the record does not show when the effects of the loss of clients would be reflected in lost revenue.[10] If the General Counsel is found to have made an initial prima facie showing of discrimination against Christie, an absence of corroborating business records could be relevant at the second step of an analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See *Davey Roofing, Inc.*, 341 NLRB No. 27 at slip op. 2 (2004), citing *Reeves Rubber, Inc.*, 252 NLRB 134, 143 (1980). A countervailing consideration in the present case would be that when Christie's position was eliminated the number of the Employer's media buyers was reduced from five to four for a substantial period of time, which is consistent with a reduction in the media department workforce for business considerations.

Griesman and Ellison testified that the lost revenue was addressed by reorganizing the media department and terminating Washington on August 6 and Christie on August 12. The termination of Christie and Washington and the reassignment of Christie's accounts to Gibson were recommended by Griesman and approved by Ellison in a telephone conversation. Both Griesman and Ellison testified that the decision was not the

[8] Bradley and Christie did not get along and Bradley quit.

[9] In a letter to Christie's attorney on September 3, the Employer's attorney stated that the loss of billings was approximately $400,000.00 per month, causing a loss of about $50,000.00 per month in commissions.

[10] Contrary to the suggestion of the General Counsel on brief, there was no showing that the Employer failed to comply with any government subpoena duces tecum relating to such business records.

subject of memoranda or otherwise memorialized and that this sort of informal decision-making was normal.

Ellison was on vacation beginning July 30. He returned to the office briefly on August 18. He learned at that time that a letter had been received from Christie's private attorney dated August 15, addressing asserted Title VII issues relating to Christie's discharge. [11] He returned to the office full time on August 20, and met with Griesman, Sports, and Gable. He testified that he was unaware of the matters addressed in Christie's August 1 memorandum before he returned from vacation. Christie had given a copy of the memorandum to Ellison's assistant, Judy Plumb. Ellison spoke with Plumb about every 3 or 4 days by satellite telephone while was on vacation. He acknowledged that he spoke with Sports about Christie's impending termination while he was on vacation. That testimony is consistent with Sports testimony that she called Ellison to check with him after Griesman notified her that Christie would be terminated. Ellison described his conversation with Sports as follows:

> A. Rhonda said, "Are you aware," okay, "that we are going to terminate Mary," and I said, "Yes." . . . Rhonda said, "Well, there may be problems with Mary in that she will be unhappy," I kind of cut Rhonda off to say, "Well, Rhonda, I understand why Mary would be unhappy," okay, "that is an unfortunate thing, when people are laid off, we have to make this adjustment, and I'm going to support Barbara."
> Q. Did Rhonda Sports tell you that Mary Christie had filed a written complaint with her, dated August 1st, 2003?
> A. No.

Sports description of the conversation was consistent with that of Ellison. Sports testified she called Ellison because of the matters Christie had raised in the August 1 memorandum after Griesman left her office on August 13. She related that she told Ellison that she needed to speak with him regarding Mary Christie because Griesman had said that the Employer needed to lay her off and that she had some issues that she needed to discuss with him that needed to be looked into inside the company. Sports testified that Ellison told her that he had spoken with Griesman and the issues raised by Christie were not discussed.

Sports testified that she did not discuss the August 1 memorandum to Griesman or discuss with him Christie's concerns expressed to her on July 31. She explained that she had asked Christie on July 31, if she had spoken to Griesman about her concerns and had been told by Christie that she had. The evidence is that Sports only participated administratively in the discharge of Christie. She was not involved in the decision to terminate Christie and did not have the authority to overrule the decision.

Thus, the testimony of Ellison, Griesman, and Sports is that Ellison and Griesman had no knowledge of Christie's July 31 meeting with Sports or the August 1 memorandum until after Christie was terminated. A manager's or supervisor's knowledge of an employee's protected concerted activities may be imputed to the employer, but if such knowledge is denied, and the denial is credible in the context of all of the circumstances of the case, knowledge of protected activity will not be imputed to the employer. *Dr. Philip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983).

My review of the testimony and the other evidence in this case convinces me that Sports did not disclose her July 31 conversation with Christie or the August 1 memorandum until Ellison returned from vacation, after Christie's discharge. Sports' testimony was offered in an especially convincing manner. She candidly acknowledged calling Ellison to discuss the August 1 memo. By calling Ellison she was essentially questioning a decision made by Griesman, a corporate vice president whom Ellison testified he trusted implicitly. If Ellison responded to Sports' concern by saying that he had discussed the decision with Griesman, it is not improbable that Sports would refrain from pressing the matter. In this regard, Ellison's testimony was that of a confident and assertive person who Sports may not have been inclined to question. A further consideration is that the record shows that tension existed between vice president Griesman and vice president Griffin. Griffin took Christie forthwith to Sports to register her complaints about Gable. If Sports had pressed the matter with Ellison, she would have risked being drawn into an office dispute between corporate officers. Ellison and Griesman testified in a credible manner regarding their lack of knowledge of Christie's reports to Sports before Christie was terminated. I have considered the fact that Christie was discharged less than 2 weeks after she engaged in protected concerted activity. This close timing is suspect, considering Christie's tenure and work record. Nevertheless, evidence is insufficient to show that there is more than a coincidental correlation. In view of the foregoing, I decline to impute Sports knowledge to other members of management at the time of Christie's termination.

The General Counsel contends that the Employer terminated Christie because she engaged in concerted activity, in violation of Section 8(a)(1) of the Act. The standards for assessing alleged Section 8(a)(1) discrimination were stated in *Diva, Ltd.*, 325 NLRB 822, 830 (1998) and again in *Alex R. Thomas & Co.*, 333 NLRB 153, 164 (2001):[12]

In *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985), reaffd. 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), the Board established the test for determining whether an employee has been discharged for protected concerted activity under Section 8(a)(1) of the Act. In order to be found ''concerted,'' an employee's activity must be engaged in with or on the authority of other employees, and not solely on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. Id. at 497. In the second *Meyers* decision, the Board explained, in response to the court's remand, that individual activity could

[11] Christie had told Miller on July 31, that she would make a written submission to Sports based on advise from her attorney.

[12] Some citations have been moved from footnotes to the text.

still be found to be concerted under the new test if there is some demonstrable linkage to group action. The Board reiterated its position that an individual employee's actions seeking to initiate, or to induce or to prepare for group action, as well as an individual employee's bringing truly group complaints to the attention of management, will be found concerted. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. Id. at 886–887. See also *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). Since *Meyers*, the Board has found an individual employee's activities to be concerted when they grew out of prior group activity *Every Woman's Place*, 282 NLRB 413 (1986); when the employee acts, formally or informally, on behalf of the group. *Oakes Machine Corp*., 288 NLRB 456 (1988); or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected, *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), enfd. 853 F.2d 966 (1st Cir. 1988); *Circle K Corp.*, 305 NLRB 932 (1991). However, the Board has long held that, for conversations between employees to be found protected concerted activity, they must look toward group action and that mere ''griping'' is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), and its progeny.

In summary, to prove that the Employer has retaliated against Christie for exercising her right to engage in protected concerted activity, the General Counsel must established: (1) Christie engaged in concerted activity; (2) the Employer knew of the concerted nature of the activity; (3) the concerted activity was protected by the Act; and (4) the adverse action taken against Christie was motivated by the activity. *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001).

On July 30, Christie and Miller discussed Gable's remark that day about Griffin that preceded the confrontation between Miller and Gable. Christie and Miller discussed what should be done and Christie urged Miller to bring the matter to the attention of management. At Christie's urging, Miller set out to report the incident to Griffin. The object of the Miller and Christie's concern, the perceived offensive language by Gable of a sexual nature, was a legitimate employee concern and their activity preceding the elevator incident was classic protected concerted activity. The same conclusion is warranted regarding Christie's describing to Griffin the remark Miller had related to her. Christie's statement to Sports that she might want to talk to Miller was also in furtherance of her concerted activity with Miller. The activity did not lose its protection because Miller misunderstood what Gable said. Moreover, Gable's actual remarks describing men's swimwear as a "banana hammock" might well be considered offensive and a proper subject of a concerted complaint.

The evidence does not show that Christie's other activity was concerted. The record shows that Christie spoke at work with other employees concerning her displeasure with a number of workplace issues. She spoke about these matters principally with Miller and Washington. The subjects discussed in those conversations included the meeting where Gables referred to her as a "cocky rooster;" Gable repeatedly referring to Griffin as Christie's husband and boyfriend; Gable using inappropriate language; and Griesman's "what goes on in media stays in media" directive. Those conversations and others with fellow employees were not shown to be more than Christie voicing her apparently numerous personal complaints that did not look toward group action.[13]

Assuming, without deciding, that the conversations Christie had with Miller and Washington were concerted activity, the evidence does not show employer knowledge. Most of the conversations that Christie had with Washington regarding terms and conditions of employment were in the two-person office they shared. No one else was shown to be present or to have likely learned of the content of thier discussions. One claimed conversation that did not occur in their office was a discussion of a new buyer, Jen Bradley. That discussion occurred before Washington and Christie began sharing an office, at least 8 months before Christie was terminated. The evidence does not show that anyone was in the area and in a position to overhear that single conversation. The conversations that Christie had with Miller appear to have been one-on-one discussions and the evidence does not show that others were in a position to have overheard their discussions. In particular, the evidence does not show that the conversations occurred in the open work area where others were likely to overhear their discussions. The evidence affirmatively points to Christie having private conversations with Miller and Washington.

The General Counsel contends that that the Employer should be found to have knowledge of the content of Christie's conversations with other employees based on the "small plant doctrine." See *Wiese Plow Welding Co.*, 123 NLRB 616 (1959). In its decision in *Hadley Mfg.* 108 NLRB 1641, 1650 (1954), the Board stated:

> The mere fact that Respondent's plant is of a small size, does not permit a finding that Respondent had knowledge of the union activities of specific employees, absent supporting evidence that the union activities were carried on in such a manner, or at times that in the normal course of events, Respondent must have noticed them.

The evidence does not show that Christie's conversations with Washington and Miller were conducted in such a manner that the Employer would become aware of the content of the conversations. The evidence is more consistent with Christie having conversations that were intended to be personal. Other than a portion of her conversation with Miller that Christie disclosed to Griffin in the elevator on July 30, I find that the General Counsel has not proven Employer knowledge of the conversations Christie had with other employees regarding terms and conditions of employment.

Other than describing some of Christie's involvement in reporting Gable's remark regarding Griffin, the August 1 memorandum from Christie to Sports and Ellison does not allude to concerted activity. On brief the General Counsel contends that

[13] The record suggests that Christie's concern with the "what goes on in media stays in media" directive may have been related to her association with Griffin. Griffin was a manager from outside the media department who had obtained media department information from Christie.

Christie engaged in protected concerted activity by addressing the other matters in the August 1 memo, because the memorandum addressed concerns that other employees shared. The General Counsel cites *Diagnostic Center Hospital Corp. of Texas*, 228 NLRB 1215, 1217 (1977), which relied on *Alleluia Cushion Co*., 221 NLRB 999 (1975). *Diagnostic Center Hospital Corp. of Texas* was overruled by *Meyers Industries*, 268 NLRB 493 (1984). See *Spartan Plastics*, 269 NLRB 546 fn. 3 (1984).

The issue presented is whether the Employer was motivated by Christie's protected concerted activity on July 30, her meeting with Sports on July 31, or her August 1 memo. In *Golden State Foods Corp.*, 340 NLRB No. 56, slip op. at 4 (2003), the Board stated:

> In cases like this one, involving 8(a)(3) violations that turn on the employer's motivation, we apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under that analysis, the General Counsel must make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion then shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996). However, if the evidence establishes that the reasons given for the Respondent's action are pretextual--that is, either false or not in fact relied upon--the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp*., 255 NLRB 722 (1981).

The same test is applicable to alleged Section 8(a)(1) discrimination violations that turn on employer motivation. The General Counsel has established that Christie engaged in protected activity, but the Employer has not been shown to have knowledge of protected concerted activity by Christie at the time of her discharge. Since the Employer did not have knowledge of the protected activity, the activity could not have been a substantial or motivating reason for the Employer's action. Accordingly, the General Counsel has not satisfied the first step of the *Wright Line* analysis. I therefore shall recommend dismissal of the allegation that Christie was discharged in violation of Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining the rule in its Employee Handbook that prohibits soliciting during working hours and/or in working areas.

3. The Respondent has not otherwise violated the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended order.[14]

ORDER

The Respondent Ellison Media Company, Phoenix, Arizona, its officers, agents, successors, and assigns, at the plant shall

1. Cease and desist from

(a) Maintaining the rule in its Employee Handbook that prohibits soliciting during working hours and/or in working areas.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule in its Employee Handbook that prohibits soliciting during working hours and/or in working areas.

(b) Within 14 days after service by the Region, post at its Phoenix, Arizona place of business the attached notice marked "Appendix." [15] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that while these proceedings are pending the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Phoenix, Arizona place of business at any time since March 30, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, San Francisco, California, September 29, 2004.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment of The United States Court of Appeals Enforcing An Order of The National Labor Relations Board."

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL rescind the rule in our Employee Handbook that prohibits soliciting during working hours and/or in working areas.

WE WILL NOT, in any similar way, interfere with your rights to act together for your benefit and protection.

ELLISON MEDIA, INC.